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Testimony
Before the Subcommittee on National Parks
United States House of Representatives

Oversight Hearing on
The National Historic Preservation Act

April 21, 2005

Introduction. Chairman Nunes and members of the National Parks Subcommittee, my name is James T. Martin. I am a member of the Poarch Band of Creek Indians and Executive Director of the United South and Eastern Tribes, Inc. (USET), an inter-tribal organization representing 24 tribes from Maine to Texas. USET appreciates this opportunity to provide testimony on the discussion draft of proposed amendments to the National Historic Preservation Act (NHPA). We especially appreciate that you are providing this opportunity before any actual legislation has been introduced. Such early consultation between the Federal Government and tribes on Federal actions that will significantly affect tribes is in the best traditions of the government-to-government relationship and is consistent with the Federal trust responsibility.

My testimony will focus on Section 4 of the discussion draft, which proposes a change in the scope of historic properties subject to the Federal consultation obligation found in Section 106 of the NHPA ("the Section 106 process"). In particular, Section 4 would eliminate the current language in Section 106 that includes as covered properties not only properties listed on the National Register, but also properties "eligible for inclusion in the National Register." As virtually every tribal historic property, defined in the NHPA as properties of "religious and cultural importance" to a tribe or Native Hawaiian Organization, falls into this latter category, the termination of this category would essentially eliminate tribal sacred sites from the Section 106 process. As such, Section 4 represents a draconian measure that would strike at the heart of tribal identity, severely undermine the progress made by tribes in recent years to have our sacred places respected and protected, and would represent the single worst piece of legislation for tribal culture since the infamous General Allotment Act of 1887, which resulted in the loss of two-thirds of tribal reservation lands to non-Indian settlement.

At least 95% of the history of the Americas occurred before 1492 when Columbus happened upon this continent. That history is recorded in the sites of cultural and religious importance to tribes. That history should be accorded a weight equal to that given historic properties of far more recent vintage.

Notwithstanding USET's objections to Section 4, USET is willing to work with the Subcommittee and other interested parties to find ways to address the Subcommittee's concerns. USET has worked on these issues intensely for several years in the context of the development by the Federal Communications Commission of a Nationwide Programmatic Agreement (NPA) implementing the Section 106 process. During that proceeding, USET put a number of proposals on the table for consideration by both the FCC and the telecommunications industry. The telecommunications industry was generally not willing to engage USET in a substantive way and sought to sharply limit tribal rights in the NPA. The FCC took on the difficult role of Solomon and adopted a balanced document that, while it did not give USET all it wanted, at least assured that the tribal voice would continue to be heard when a tribal site was at risk. In a corollary document

known as the Best Practices, USET agreed to a voluntary process whereby the tribal right of consultation with the FCC could be waived when industry had worked with an affected tribe to resolve siting issues. Though never properly appreciated by industry, this waiver was a huge concession by USET made in the name of finding a workable solution to industry's concerns while still assuring that tribal sites and rights were maintained. USET also agreed to participate in and strongly supported the development by the FCC of the Tower Construction Notification System, a database that would electronically alert telecommunications companies of areas of cultural interest to tribes. Through this database, industry can quickly identify what tribes they need to contact in any given area based upon their site locations. Consequently, through this tribal self-identification the number of tribes needing to be contacted will be greatly reduced. Already, over 300 tribes have entered their areas of cultural interest into the database. This extraordinary response by tribes demonstrates our commitment to assisting industry with solutions to their concerns.

Although USET did not find industry a willing partner in our efforts to craft solutions that benefit both parties, as a matter of principle we remain open to working with all parties and will continue to extend an invitation to industry to work with us, rather than against us, to assure the efficient development of a universal communications infrastructure without compromising the sacred heritage of America's first peoples.

The National Historic Preservation Act provides critical protection for tribal sacred sites. The National Historic Preservation Act (NHPA) provides protection for "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering, and culture." 16 U.S.C. Section 440(f). The NHPA does this by requiring federal agencies engaged in a "federal undertaking" to "take into account the effect" the undertaking may have on historic properties "included", or "eligible for inclusion" in the National Register of Historic Places. *Id*.

The NHPA defines "Undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including – (A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and, (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 16 U.S.C. 470w(7).

The NHPA is implemented through a set of regulatory requirements commonly referred to as the Section 106 process, a consultation process through which federal agencies collect information concerning a particular site's eligibility for the National Register, potential adverse effects the undertaking may have on the site, and ways to mitigate any adverse effects. See 34 C.F.R. Part 800.

The NHPA sets forth two distinct requirements with regard to Tribes. First, the NHPA obligates a Federal agency to evaluate its undertakings for their impact on tribal historic properties. 16 U.S.C. 470a(d)(6)(A). In carrying out this obligation, a Federal agency would, in many cases, need to secure the cultural and religious expertise of any Tribe whose historic property could be affected. This is necessary in order to properly evaluate the impact of that undertaking on that Tribe's historic property.

Second, a Federal agency is obligated to seek official tribal views through consultation on the effect of an undertaking, a distinctly different exercise from securing the Tribe's cultural and religious expertise for evaluating the impact of an undertaking. Specifically, the NHPA provides that federal agencies "*shall consult* with any Indian tribe and Native Hawaiian organization that attaches religious or cultural significance" to properties that might be affected by a federal undertaking. 16 U.S.C. Section 470a(d)(6)(B) (emphasis added).

Notably, the NHPA only provides tribes with a right to be consulted. After a Federal agency has engaged in tribal consultation, it is free to pursue whatever course it deems best even if that course is one opposed by an affected tribe. In that sense, the tribal rights in the NHPA are actually quite limited in scope. Nonetheless, the Section 106 process is relied upon by tribes throughout the United States to give them a voice.

The Section 106 process embodies quintessentially American values that should not be undermined. In the best traditions of American democracy the Section 106 process gives marginalized groups a role in the shaping of the American identity by assuring them a voice when their own interests are jeopardized. Without this process, tribes would be virtually powerless to act to protect their heritage. In some ways the NHPA itself is an historical marker of American identity and, as such, should not be weakened.

Of course, Congress was specifically thinking about American values when it enacted the NHPA declaring in Section 1 that

> "(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
> (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
> (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
> (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;"

These statements ring with the greatness of America, but it would be a hollow ring if they were not applied to the historic properties of all Americans. In the NHPA, Congress has truly recognized the value of the meaning of American history; that the history of all communities is worthy of respect; that the lessons of the past can inform the actions of the present and future; that historic properties of all types represent a priceless heritage whose loss can not be mitigated.

In the interests of justice, Section 106 should be strengthened, not weakened, by giving tribes more than just consultation rights. Section 106 only provides tribes a consultation right. This right is very limited in scope. A Federal agency after review and consultation with an affected tribe, can choose to ignore the tribal views and proceed with a particular action. Since 1492, Indian tribes within what is now the United States have, as a group, lost 98% of their aboriginal land base. This percentage is even higher for the member tribes of USET, whose aboriginal lands were the first to be subsumed in the process of European settlement. Today, as a result, the overwhelming majority of tribal properties of cultural and religious significance are located off Indian Reservations and Federal trust lands and therefore lie beyond tribal control. The National Historic Preservation Act (NHPA) recognizes the validity of continuing tribal concerns with the protection of both on- and off-Reservation properties of cultural and religious significance, and establishes, through Section 106, extensive Federal agency consultation requirements with tribes when there is a Federal "undertaking" with the potential to have any affect on such properties. Sometimes, however, a consultation right is just so much hot air. This Committee should consider giving tribes the ability in certain situations to halt a Federal action that threatens a significant tribal cultural or religious property.

The telecommunications industry, which appears to be a strong advocate for Section 4 of the discussion draft, has consistently advocated for weakening tribal consultation rights under Section 106. Over the last three years, USET has been intensely involved in the development and promulgation of a Nationwide Programmatic Agreement (NPA) by the Federal Communications Commission. The NPA replaces the NHPA regulations, providing a customized process for Section 106 consultation with regard to the siting of communications towers. USET was extremely interested in this document because, despite the NHPA, literally tens of thousands of cell towers have been constructed and received FCC broadcasting licenses with virtually no effort by the FCC to consult with tribes. One can see major sacred mountains in the Southwest that look like porcupines because of the antenna farms that have been placed upon them without any tribal consultation.

In a belated attempt to make up for past errors, the FCC at one point stated that it had delegated its consultation obligations to the cell tower companies, who subsequently began sending letters to tribes demanding information, some of it very sensitive in nature, and asserting that if the information was not provided within a certain timeframe, usually 10 to 30 days, as one typical letter to the Chitimacha Tribe of Louisiana put it, "[w]e will presume that a lack of response

from the Chitimacha Tribe of Louisiana to this letter will indicate that the Chitimacha Tribe of Louisiana has concluded that the particular project is not likely to affect sacred tribal resources." Tribes have literally received thousands of these letters. To add insult to injury, the letters frequently refer to the tribes as "organizations" or "groups" demonstrating a lack of respect for tribal sovereignty, ignorance of the status of tribes and their unique legal rights, and generally conveying an impression that these companies do not care about tribal views. The Tribal Historic Preservation Officer for the Mississippi Band of Choctaw Indians, Kenneth H. Carleton, has noted that the Mississippi Band had received "a minimum of over 1,000 requests" from cell tower companies, many providing virtually no information on the location of the sites or maps, but all with at least a check off saying that there are no sites of religious or cultural importance to the tribe to make it easy to for tribes to "rubber stamp their requests!"

The major telecommunications companies were involved early in the NPA's development (far earlier than tribes). The telecommunications companies raised their issues including a desire to complete historic reviews quickly, at a minimum cost, and with certainty. In those efforts they sought to shove aside tribal concerns. While acknowledging on the one-hand the unique status of Indian tribes, the companies on the other hand would essentially argue that that unique status should not result in any actual difference in how tribal interests are treated.

The industry position is understandable. They are for-profit entities. Conducting historic property reviews, although only a fraction of the cost of constructing a tower, does have a cost (of course, the destruction of a sacred site cannot be measured in monetary terms). However, when the FCC licenses a tower, it is essentially granting a license to these companies to make money. As one industry ad with a photo of a cell tower put it: "This is not a cell tower. This is a money tree." As industry stands to benefit greatly from FCC licensing, it should also bear the cost of assuring the protection of historic properties. Congress has weighed the competing values of keeping costs low for developers and telecommunications companies, with the imperative of preserving our national heritage. The result of that deliberation provided tribes with consultation rights, a boon to tribes, but not with veto rights, a boon to federal agencies and developers.

USET has sought to work closely with Industry, which has been a very reluctant partner in seeking solutions that protect tribal consultation rights regarding sacred sites. Almost four years ago, USET entered into detailed negotiations with a communications industry association to develop a process for addressing these issues that worked for both industry and tribes. USET recognizes that the construction of a universal wireless telecommunications infrastructure network is vital to the economic and social future of the United States. However, the tribal interests at issue are also vital, both to the tribes, and to the United States in terms of its historic preservation goals and its national identity as a nation of diverse and vibrant peoples and cultures. USET worked hard to find pragmatic solutions, while still assuring respect for tribal sovereignty and maintaining the FCC's ultimate consultation responsibility. Based on the

negotiations, USET developed and sent to the industry group a set of protocols. We waited many months for a response, and then were told that the industry group had no further interest in these negotiations.

This experience told us that it is vital that the Federal government, consistent with its trust responsibility, assure that the tribal voice is heard. USET knows, from other Section 106 negotiations, that tribal concerns can be addressed without undermining the mission of a federal agency. For example, USET tribes have successfully negotiated a Memorandum of Agreement with the Mississippi National Guard, which among other things protects a tribal sacred site in the middle of a tank training range. Both sides made compromises to ensure that the vital interests of both could be protected. Similarly, the Louisiana tribes have a memorandum of agreement with the Louisiana National Guard. When an issue arose regarding rerouting a dangerous road at Camp Beauregard through an archeological site, the Louisiana Indian tribes worked with the Louisiana National Guard to permit the rerouting after appropriate archeological excavation and mitigation was undertaken. Tribes are not irrational; they have the same interests and concerns as do other communities. They want to build a solid working relationship with industry to assure that everybody's interests are given due regard.

The current definition of properties covered under Section 106 of the NHPA is the only sensible definition. The National Historic Preservation Act defines "'historic property' or 'historic resource'" as "any prehistoric or historic district, site, building, structure, or object included in, *or eligible for inclusion on* the National Register, including artifacts, records, and material remains related to such a property or resource." 16 U.S.C. Sec. 470w(5) (emphasis added). Congress found that "historic properties significant to the Nation's heritage are being lost or substantially altered, *often inadvertently*, with increasing frequency." 16 U.S.C. Sec. 470(b)(3) (emphasis added). This inadvertent damage was done principally where properties were not recognized as historic; essentially those properties not listed in the National Register of Historic Places. To address the fact that the National Register is not a comprehensive listing of historic properties, Congress logically provided that the NHPA would also protect properties that are "eligible for inclusion on the National Register…."

The NHPA authorizes the creation of one list of properties - the National Register (16 U.S.C. Sec. 470a), but as is evident from the definition of "historic property," the NHPA specifically protects properties both on the National Register as well as properties not on the National Register if they meet National Register criteria. The Advisory Council on Historic Preservation, in its implementing regulations, recognized the NHPA's mandate, and therefore Congress' mandate, to protect *all* eligible properties and provided that the term "*eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria." 36 C.F.R. Part 800.16(l)(2). In this definition, the Advisory Council was recognizing that the Department of the Interior has created a second list of properties that have been formally determined to be eligible for, but are not on, the National Register. However, that second list is not comprehensive and is essentially merely an aid to implementing the NHPA.

Therefore, consistent with the language of the statute, the Advisory Council did not limit its definition just to Interior's "eligibility" list, but also included *all* eligible properties. The Advisory Council understands that there are many sites that have not yet been evaluated but that will be found eligible for the National Register. Such sites would be in great peril if there were no requirement to essentially "watch out" for them and protect them where they are found.

Due to the historic problem of widespread looting and sale of Indian grave goods and artifacts, many tribes do not want their sites identified on a publicly available list. These tribes still expect and are entitled to the full protections of the NHPA from Federal undertakings that could damage these sites. However, these tribes are not interested in seeing their sacred sites placed on publicly available lists, including the National Register.

General principles of Federal Indian law recognize tribal sovereignty, place Tribal-US relations in a government-to-government framework, and establish a Federal trust responsibility to Indian tribes. These general principles are rooted in the U.S. Constitution (Art. I, Section 8), Federal case law, Federal statutes, Presidential Executive Orders, regulations, and case law, as well as in the policy statement of the Advisory Council on Historic Preservation entitled *The Council's Relationship with Indian Tribes*. As such they form the basis for the tribal consultation rights in the NHPA. To delete those rights would be to undermine the entire structure of Federal Indian law and tribal sovereignty.

Congressional Indian policy with respect to Indian religious matters is set forth in the American Indian Religious Freedom Act (AIRFA):

"Protection and preservation of traditional religions of Native Americans

> Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

42 U.S.C. Section 1996. AIRFA also requires federal agencies to consult with Native American traditional religious leaders in order to evaluate existing policies and procedures and make changes necessary to preserve Native American cultural practices. Act of Aug. 11, 1978, P.L. 95-341, Section 2. 92 Stat. 470.

There are several other statutes where Congress has set forth a policy of protecting traditional Indian religion, such as the Native American Graves Protection and Repatriation Act (NAGPRA, 25 U.S.C. §3001 et.seq.), the Archaeological Resources Protection Act (ARPA, 16 U.S.C. § 470aa-70mm), and the National Museum of the American Indian Act

(20 U.S.C. § 80q et.seq.). The consultation requirements of, and legal rights established by, these statutes are not geographically confined to situations where cultural or religious objects are found (or activities occur) solely on tribal lands.

There are several presidential orders that mandate Federal consultation with Indian tribes. Executive Order 13007 (May, 24 1996) (hereafter "Executive Order on Sacred Sites") directs federal agencies to provide access to American Indian sacred sites, to protect the physical integrity of such sites and, where appropriate, to maintain the confidentiality of these sites. This Executive Order on Sacred Sites also incorporates a prior Executive Memorandum issued on April 29, 1994, which directed federal agencies to establish policies and procedures for dealing with Native American Tribal Governments on a "government-to-government basis."

Executive Order 13175 (Consultation and Coordination with Indian Tribes, November 6, 2000) directs Federal officials to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.

The Federal Courts have developed canons of construction that are used to interpret Indian treaties and statutes relating to Indians. The fundamental component of these canons of construction is that treaties and statutes are to be liberally interpreted to accomplish their protective purposes, with any ambiguities to be resolved in the favor of the Indian tribes or individual Indians. See *Alaska Pacific Fisheries Co. V. United States*, 248 U.S. 78, 89 (1918) ("the general rule [is] that statutes passed for the benefit of the dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973). In this context, the National Historic Preservation Act should be read broadly to support and protect tribal interests.

Conclusion. Although USET strongly opposes Section 4 of the discussion draft, USET is open to working with the Subcommittee and other interested parties in finding ways to address the underlying needs of developers, including notably the telecommunications industry, *so long as any solution does not jeopardize tribal sacred sites or the rights of tribes to be consulted when a Federal agency acts in a manner which could adversely affect a tribal sacred site*. USET thanks the Subcommittee for this opportunity to testify and looks forward to working closely with you and your staff to find practical solutions that protect tribal sites and rights, while addressing the concerns of all the stakeholders in the Section 106 process.